Supreme Court, U.S.
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No. 97-1391

In The

Supreme Court of the United States

October Term, 1997

FORD MOTOR COMPANY,

Petitioner,

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Dee-Witt C. Sperau and Samuel R. Foster, II, respectfully submit this brief in opposition to the petition of Ford Motor Company ("Ford") for a writ of certiorari to review the judgment of the Supreme Court of Alabama rendered pursuant to its decision of September 5, 1997.

STATEMENT

On June 9, 1995, the Supreme Court of Alabama issued its per curiam opinion in this case, which affirmed a $6 million punitive damages verdict in favor of the respondents and against Ford on respondents' intentional fraud and deceit claims arising under Ala. Code 1975, §§ 6-5-101 through 6-5-104. *Sperau v. Ford Motor Company*, 674 So. 2d 24 (Ala. 1995).[1]

On September 25, 1995, Ford paid respondents the compensatory portion of the judgment in the amount of $1,692,000.[2] The judgment included compensatory awards for economic damages and damages for personal

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[1] The opinion is reproduced and designated Appendix B of Ford's petition at 32a-66a.

[2] Ford Motor Credit Company's judgment against the respondents in the amount of $635,000 was satisfied contemporaneously. Respondents did not contend at trial that their economic damages included the $635,000 debt claimed by Ford Credit as Ford has previously claimed on rehearing before the Supreme Court of Alabama. R. 2013-2015 (closing argument).

injury due to mental anguish caused by Ford's commission of intentional fraud and deceit against respondents.

In its opinion of June 9, 1995, the Supreme Court of Alabama rejected Ford's arguments that respondents' claims were not supported by sufficient evidence and that respondents' damages were not proximately caused by Ford. Pet. App. B, 43a-57a. The court also rejected Ford's race-based-theory argument both on the merits and on waiver in failing to assert a federal preemption defense. Pet. App. B, 51a.

In paying the compensatory portion of the judgment, Ford has also waived any challenge of the Supreme Court of Alabama's findings on the issues of sufficiency of the evidence and proximate cause. Consequently, Ford's reference to "[r]espondents' [m]ismanagement of the [d]ealership" is not relevant to any issue which Ford has preserved. Pet., 9. Secondly, Ford's partial satisfaction of the judgment waived Ford's contention that the judgment is based on a theory not presented to the jury. Pet., 18. This contention is waived for the reason that the respondents' causes of action for legal fraud and deceit were the very same "legal theories" supporting the judgment for compensatory as well as punitive damages. Ford failed to preserve, and has affirmatively waived, any challenge to the legal theory on which the judgment for compensatory and punitive damages was based. Finally, Ford's payment of the compensatory portion of the judgment constitutes a legal admission by Ford that it inflicted both economic and personal injury on the respondents, which was done intentionally through affirmative acts of misconduct for

which Ford was subject to punitive damages under Ala. Code 1975, § 6-11-20.

On May 28, 1996, this case was remanded to the Supreme Court of Alabama by order of this Court, "for further consideration in light of *BMW of North America, Inc. v. Gore*, 517 U.S. ___ (1996)." *Ford Motor Company v. Sperau*, No. 95-771.

On September 5, 1997, the Supreme Court of Alabama issued its per curiam opinion pursuant to this Court's remand order.[3]

In its first opinion of June 9, 1995, the Supreme Court of Alabama unanimously held that this case was appropriate for the imposition of punitive damages under Alabama law, although the dissenting justices differed with the majority as to the appropriate amount of punitive damages. In the opinion of September 5, 1997, the Supreme Court of Alabama again unanimously agreed that this case was appropriate for the imposition of punitive damages under Alabama law, although once again the court was divided as to an appropriate amount. The Supreme Court of Alabama affirmatively stated that it complied with this Court's mandate to reconsider the question of the excessiveness of the punitive damages judgment in this case in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). Pet. App. A, 6a. Having reviewed this case in compliance with this Court's mandate, the Supreme Court of Alabama affirmed the punitive judgment on the condition that

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[3] The opinion is reproduced and designated Appendix A of Ford's Petition at 1a-31a.

respondents accept a remittitur of $4,208,000. Pet. App. A, 23a.

On September 24, 1997, respondents filed their acceptance of remittitur of punitive damages to the sum of $1,792,000. On January 23, 1998, the court gave notice that Ford's application for rehearing filed September 1, 1997 was overruled. Pet. App. D, 76a. The certificate of judgment of affirmance was issued by the Supreme Court of Alabama on February 10, 1998.

REASONS FOR DENYING THE WRIT

1. There Are No Compelling Reasons For Granting A Writ In This Case.

Ford invokes the jurisdiction of this Court seeking the issuance of a writ of certiorari pursuant to 28 U.S.C. § 1257(a). However, the punitive damages judgment in this case was rendered with due process of law under the Fourteenth Amendment of the United States Constitution as most recently interpreted by this Court. This Court's mandate of May 28, 1996 required the Supreme Court of Alabama to consider this case in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Ford Motor Company v. Sperau*, No. 95-771. The Supreme Court of Alabama's decision of September 5, 1997 was done in compliance with this Court's mandate of May 28, 1996. Pet. App. A, 6a.

Ford's challenge to the judgment of the Supreme Court of Alabama is no more than baseless allegations

that the court made erroneous factual findings and misapplied properly stated rules of law. Even assuming that Ford's petition is factually and legally correct, which it is not, it raises issues of the type for which a writ of certiorari is rarely granted. Rules of the United States Supreme Court, Rule 10. Ford's petition presents no compelling reason making this case such a rare exception. To the contrary, Ford's petition is merely a motion for remittitur under the guise of a petition.

Ford's contention that it had no notice of the legal theory on which the case was tried is without merit and frivolous. The judgment in this case was based upon Ala. Code 1975, §§ 6-5-101 through 6-5-104 and legal precedents of the Supreme Court of Alabama construing these statutory provisions. The foregoing legal theories on which respondents based their case both at trial and on appeal did not vary. The affirmance of the judgment based upon these legal theories presents questions purely of Alabama law decided by the Supreme Court of Alabama. Additionally, Ford has waived any issue concerning the legal theory on which the judgment was based by payment of the compensatory portion of the judgment and by failure to affirmatively plead federal preemption.

Ford's allegation that the imposition of punitive damages in this case violates Ala. Code 1975, § 6-11-20 is false. The Supreme Court of Alabama specifically found clear and convincing evidence in this case that "Ford 'consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff[s],' § 6-11-20(a), Ala. Code 1975. . . . " Pet. App. A, 6a. This finding presents purely a question of Alabama law decided by the Supreme Court of Alabama. Also, Ford's

payment of the compensatory portion of the judgment constitutes a legal admission by Ford that it intentionally inflicted economic and personal injury on the respondents warranting the imposition of punitive damages pursuant to Ala. Code 1975, § 6-11-20.

2. Ford's Liability Is Based Upon The Law And Evidence Presented To The Jury.

The genesis of Ford's post-hoc-theory argument is manifested in the following excerpt from the opinion of June 9, 1995:

> Ford also claims that even if the plaintiffs have adduced sufficient evidence to support their misrepresentation and suppression claims, the theory upon which those claims rest, conflicts with federal law and is therefore preempted under the Supremacy Clause of the United States Constitution. Ford claims that an award of damages under state common law may be subject to conflict preemption if it effectively requires behavior that would be prohibited under federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Ford argues the plaintiffs' claims boil down to the contention that Ford should have inflated the capital requirement and concomitantly reduced the projected return on investment because Foster is an African-American. Ford contends that this verdict would require Ford to do precisely what 42 U.S.C. § 1981 prohibits, offer dealerships to black applicants on less favorable terms than are offered to white applicants.
>
> We reject this contention, because it is premised upon an erroneous characterization of the

> verdict in this case as requiring a higher capitalization for a black dealership than a white dealership. The verdict in this case was based upon the plaintiffs' state action for fraud. The fraud claim is not preempted by federal law. In addition, Ford's preemption argument was never raised in the trial court, and thus has been waived. Federal preemption must be affirmatively pleaded in order to avoid waiver. *International Longshoremen's Ass'n v. Davis*, 470 So. 2d 1215 (Ala. 1985).

Pet. App. B, 51a.

The court on remand of the case again rejected Ford's race-based-theory argument in its opinion of September 5, 1997. Pet. App. A, 8a-11a. Ford's post-hoc-theory argument was first raised in its September 1, 1997 application for rehearing. This frivolous argument is an obvious effort by Ford to resurrect a claim which has been waived and which was without merit from inception.

Ford cites a number of federal criminal cases for the proposition that "a defendant must have notice of the claim against it in order to be able to defend against them." Pet., 18. However, this is not a criminal case to which strict constitutional safeguards afforded to criminal defendants apply as is suggested by Ford. *See BMW, supra*, 116 S. Ct., at 1598, n. 22. Nevertheless, Ford's contention that it had no notice of the claims on which the judgment was rendered in this case is demonstrably false.

This was not a case of trial by ambush as Ford would have this Court believe. Respondents' complaint, as amended, stated claims against Ford for fraud and deceit.

C. 357-359, *e.g.*[4] The parties conducted extensive pretrial discovery, including the production of voluminous documents and the deposition of witnesses and experts, amounting to several thousand pages. Ford was provided a detailed exhibit list identifying 711 trial exhibits before trial, which included those exhibits admitted at trial. C. 1167-1215. The trial court considered the law, facts and arguments concerning the claims in this case through summary judgments supported by several hundred pages of briefs and submissions addressing every issue conceived by the parties.

The pretrial order recited respondents' claims against Ford of misrepresentation and suppression of material facts regarding capitalization of the dealership and the sales and profit forecast. C. 3825-3827. The pretrial order specifically stated that "plaintiffs' legal fraud claims are made pursuant to Ala. Code 1975, §§ 6-5-101 through 6-5-104." C. 3829. The pretrial order also provided Ford specific notice that respondents claimed compensatory and punitive damages due to the legal fraud practiced upon them by Ford. C. 3829.

The jury was instructed on the law applicable to plaintiffs' claims pursuant to Ala. Code 1975, §§ 6-5-101 through 6-5-104, including charges on willful misrepresentation, reckless misrepresentation, deceit, and fraudulent suppression. C. 2087-2089. Ford did not object to any of the instructions given by the trial court regarding the

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[4] "R. ___ " refers to the Reporter's Transcript; "C. ___" refers to the Clerk's Record.

law applicable to plaintiffs' claims or damages, but rather Ford concurred that the charges were correct statements of Alabama law. R. 2106. This case was tried, the jury was charged, and the verdict and judgment were based on the same theories of law applied throughout the case, as is proper under Alabama law. *See, e.g., City of Dothan v. Gulledge*, 276 Ala. 433, 163 So. 2d 217, 218-19 (1964) (Although relied on by Ford in its brief on rehearing, this case was one tried and argued on appeal on the same legal theory, just as is true of the respondents' case.).

Contrary to Ford's argument on this point, there was no limitation on contentions, arguments or reasons which respondents could assert in support of the judgment on appeal before the Supreme Court of Alabama, provided that these were based on the legal theories charged, and that the same were supported by the evidence. *See Beavers v. County of Walker, Alabama*, 645 So. 2d 1365, 1372 (Ala. 1994) ("However, 'the rule requiring adherence to the theory relied on below . . . does not mean the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court upon the matter or question in issue.' *Home Indemnity Co. v. Reed Equipment Co.*, 381 So. 2d 45, 50 (Ala. 1980)").

Ford's post-hoc-theory argument fails to distinguish between contentions (which, like arguments of counsel, are not the law or evidence of the case), and instructions on the law of the case arising under Ala. Code 1975, §§ 6-5-101 through 6-5-104. Many contentions were raised by the parties in the course of the trial which were based upon the law of the case. The jury had the discretion to accept or reject these contentions and apply the law to the facts as it saw fit. But in any event, the respondents'

contentions in this case were by no means limited exclusively to the contention that Ford suppressed material facts contained in documents, including Ford's Equal Employment Opportunity Reports, which is the crux of this argument. Respondents' contentions also included claims of intentional misrepresentation and deceit, among others.

Ford's post-hoc-theory argument also fails for the reason that the compensatory portion of the judgment was paid on September 25, 1995. It is implausible that Ford voluntarily paid the compensatory portion of a judgment which it now contends was based upon claims that were not presented to the jury. Ford's argument in this regard is not only post hoc, but it is also disingenuous. As previously stated, the judgment for compensatory and punitive damages in this case arises from the same legal claims. By payment of the compensatory portion of the judgment, Ford has waived any challenge to the judgment on the basis of an alleged lack of adequate notice of the respondents' legal claims.

3. Ford Had Fair Notice Under Alabama Law That It Was Subject To The Imposition Of Punitive Damages In This Case.

The Supreme Court of Alabama specifically found clear and convincing evidence in this case that "Ford 'consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff[s],' § 6-11-20(a), Ala. Code 1975. . . . " Pet. App. A, 6a. The Supreme Court of Alabama is the only court which may

authoritatively construe this Alabama statute. *BMW, supra*, 116 S. Ct., at 1600.

Among the grounds asserted by Ford in its JNOV motion is the following ground pertinent to this discussion: "There is a lack of clear and convincing evidence that the Defendant Ford consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to either of the Plaintiffs so as to warrant a jury verdict for punitive damages." C. 3901, ¶ 12. Ford correctly acknowledged that punitive damages could be imposed under § 6-11-20 upon a finding of clear and convincing evidence that Ford had consciously or deliberately engaged in either oppression, fraud, wantonness, *or* malice, as those terms are defined under the statute. *See, e.g., Motion Industries, Inc. v. Pate*, 678 So. 2d 724, 733-34 (Ala. 1996) (Applying § 6-11-20 in retaliatory discharge case). As the following discussion shows, there were several alternative grounds making the imposition of punitive damages appropriate under Ala. Code 1975, § 6-11-20 in this case.

In its order denying Ford's JNOV motion, the trial court made the following specific findings:

> "There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs due to the Defendant's fraudulent conduct and its duration supports the jury's punitive damages award in this case.

"There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstance similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

. . .

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers.

"Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an

> extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. . . . "

C. 4108-4110; Pet. App. C, 72a-73a.

Ford intentionally misrepresented material facts in order to induce the respondents to incur substantial debt, with full knowledge of their financial vulnerability. As stated by the Supreme Court of Alabama, "[G]iven Ford's knowledge of the plaintiffs' limited personal wealth in relation to the large amounts they had to borrow to invest, Ford was aware not only that the plaintiffs' ran a substantial risk of losing their investment, but also that they might face complete financial ruin if the dealership failed." Pet. App. A, 8a.

For many years preceding this action, Alabama law had recognized that a person possesses a legal right to the accurate and full disclosure of material facts under the circumstances presented in this case. Ala. Code 1975, §§ 6-5-101 through 6-5-104. Ford's intentional commission of fraud and deceit against respondents as charged under Ala. Code 1975, §§ 6-5-101 through 6-5-104, supports a determination that Ford intentionally deprived respondents of their legal right to the full and accurate disclosure of material facts. Ala. Code 1975, § 6-11-20(b)(1) (Defining "fraud" under § 6-11-20(a) to include intentional misrepresentation or deceit done with the defendant's intention of depriving a person of "legal rights."). Prior Alabama law fairly indicated that punitive damages could be imposed in this case. *See Ford Motor Company v. Sperau*, Pet. App. A, 6a-7a, n. 1 (Text and authorities discussing imposition of punitive damages for intentional fraud and deceit under Alabama law). *See also, TXO*

Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 464, 113 S. Ct. 2711, 2724 (1993) ("[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. *Haslip*, 499 U.S., at 24, n. 12, 111 S. Ct., at 1046, n. 12. Prior law, in West Virginia and elsewhere, unquestionably did so.").

Respondents contended and proved that Ford intended to cause them harm by inducing them through intentional fraud to acquire the Selma Ford dealership and to incur over $1 million of debt related thereto. The jury was properly charged and awarded compensatory damages of $992,000 due to Ford's intentional misconduct causing the creation of this debt. R. 2102-2103. Also, the jury was charged and awarded compensatory damages for personal injury due to mental anguish caused by Ford's willful fraud. R. 2087, 2104. Ford paid the compensatory portion of the judgment on September 25, 1995, thereby admitting that it had consciously or deliberately caused economic damage and personal injury due to its intentional misconduct. The damages suffered by the respondents were due to Ford's intentional misconduct "otherwise causing injury." Ala. Code 1975, § 6-11-20(b)(1).

Section 6-11-20 also provides that punitive damages may be awarded in a tort action where there is clear and convincing evidence that the defendant consciously or deliberately engaged in malice with regard to the plaintiffs. The statute defines "malice" to include "[t]he intentional doing of a wrongful act without just cause or excuse . . . [u]nder such circumstances that the law will

imply an evil intent."Ala. Code 1975, § 6-11-20(b)(2). Ford's commission of an intentional fraud under the facts of this case proved by clear and convincing evidence that Ford consciously or deliberately engaged in conduct under circumstances in which Alabama law implies an evil intent. Alabama law has traditionally placed the commission of an intentional fraud and deceit in this category. *See* text and citation of authorities at Pet. App. A, 6a-7a, n. 1.

The evidence also supports a determination that Ford engaged in "oppression" in light of the substantial mental anguish and economic hardship caused by Ford's intentional misconduct. "Oppression" is defined under the subject statute as "[s]ubjecting a person to cruel and unjust hardship in conscious disregard of the person's rights." Ala. Code 1975, § 6-11-20(b)(5).

Ford not only had notice that punitive damages could be imposed under § 6-11-20 for intentional misconduct, but Ford also had notice that sanctions in the amount imposed in this case could be awarded under the private remedy provisions of the Deceptive Trade Practices Act ("DTPA"), Ala. Code 1975, § 8-19-10. As the Supreme Court of Alabama stated, Ford specifically advocated the applicability of the DTPA "as providing due process notice of the severity of the possible punishment." Pet. App. A, 17a. It follows, then, that in light of Ford's own argument, Ford had actual notice that damages in the amount assessed could be imposed under § 8-19-10 of the DTPA for the intentional misconduct found in this case. The punitive damages award in this case, as remitted, is consistent with the legislatively sanctioned private remedy provided under the very statute

relied upon by Ford. Accordingly, the Supreme Court of Alabama's remittitur of punitive damages to an amount based upon § 8-19-10 of the DTPA, must meet even Ford's own notions of fair notice. Pet. App. A, 17a-19a, 23a.

4. The Punitive Damages Award In This Case Is Not Grossly Excessive In Light Of *BMW*.

The Supreme Court of Alabama has twice unanimously decided that this case is appropriate for the imposition of punitive damages under Alabama law. Dissatisfied with the court's $4,208,000 remittitur of punitive damages (a reduction of slightly more than 70%), Ford petitions this Court for a writ of certiorari, which petition amounts to nothing more than just another motion for remittitur under another label. Ford's petition evidences that Ford and others would relegate this Court to the role of conducting de novo reviews of every state court punitive damages case, and of entertaining every motion for remittitur of state court punitive damages awards filed under the guise of a petition. Pet., 17, n. 11 (Ford's discussion of and reference to other Alabama cases remanded for consideration "in light of *BMW*" in which petitions are now pending or anticipated).

In its September 5, 1997 opinion, the Supreme Court of Alabama stated the issue before the court as follows: "The question before us is whether the $6 million punitive damages award assessed against Ford Motor Company is excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in light of the guidelines established by the Supreme Court of the United States in *BMW of North America, Inc.*

v. Gore, 517 U.S. 559, 116 S. Ct. 1589." Pet. App. A, 1a. The court specifically stated that its reconsideration was in compliance with this Court's mandate of May 28, 1996. *Id.*, at 6a. A review of the opinion confirms that such is the case.

The first *BMW* factor considered by the court was the degree of reprehensibility. Pet. App. A, 7a-14a. In regard to the reprehensibility factor, the court concluded that the degree of reprehensibility in this case supported "a significant punitive damages award." *Id.*, at 13a. The second *BMW* factor addressed by the court was the ratio of punitive damages to the actual or likely harm. *Id.*, at 14a-15a. The court determined that "the ratio should not be much greater than 1:1." *Id.*, at 15a. Finally, the court reviewed sanctions for comparable misconduct. *Id.*, at 15a-19a. The court concluded that "the statutory maximum liability that would potentially exist under the DTPA's [Deceptive Trade Practices Act's] private right of action in this case does provide an amount that can be meaningfully compared to the punitive damages award. . . . [T]he maximum *total recovery* permitted for a violation of the DTPA under the private right of action of § 8-19-10, treble damages plus costs and reasonable attorney fees, would be somewhat over $3 million." *Id.*, at 19a.

Having considered these *BMW* factors, among others, the court affirmed the judgment conditionally on respondents' accepting a remittitur of $4,208,000. *Id.*, at 19a. On September 24, 1997, respondents accepted the remittitur of punitive damages, and the court issued its certificate of affirmance of judgment on February 10, 1997. The

punitive damages award as remitted is not grossly excessive in light of *BMW*.

CONCLUSION

Based upon the facts, law and argument presented herein, Ford's petition for a writ of certiorari is due to be denied.

Respectfully submitted,

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